therefore that there was no prohibited assignment of a claim against the United States (R. 67). The case was remanded for further proceedings consistent with this holding. This Court granted certiorari on May 27, 1957 (R. 75).

SUMMARY OF ARGUMENT

I

Since the court below held, and the respondent does not dispute, that a claim for compensation becomes vested at the time of a taking, and since this Court has made it clear that a claim for compensation from the government may not be assigned after it has vested, the issue here is when did the taking occur.

A. The federal right of eminent domain can be and is regularly exercised either (a) through the medium of condemnation proceedings instituted by the United States, (b) by physical seizure of property leaving the land-owner to suit under the Tucker Act, or (c) by statutory process which may have some element of both of these procedures. The substantial rights and liabilities of the parties are the same whatever proceeding is used.

B. Physical seizure of property is a taking giving rise to a claim for compensation which may be presented under the Tucker Act or in condemnation proceedings. Title does not pass until payment. Hence, if the obtaining of physical possession were not a taking, the Tucker Act claim would have no basis at all. And, when condemnation proceedings are later instituted, the taking for purposes of determining value and interest is the date the owners were

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In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, PETITIONER

v.

C. M. DOW

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
PERRY W. MORTON,
Assistant Attorney General,
ROGER P. MARQUIS,
Attorney,
Department of Justice, Washington 25, D. C.

deprived of beneficial use of the property. These principles have uniformly been applied by Federal appellate courts, except for the instant case.

C. The power of the United States to abandon its project after taking possession and thereupon to pay only for the temporary use of the property does not alter the fact that taking of possession is a taking. It merely means that the extent of the interest taken may be subject to question. Indeed, that is always the case in temporary emergency takings, as, for example, those for the duration of World War II.

II

The passage of title when the Government invoked the Declaration of Taking Act by filing a declaration of taking, three years after the easement had been appropriated, was not a new taking, nor did it obliterate the previous taking. The invocation of this ancillary procedure at the option of Government agents settled any prior question that the easement taken might not be permanent, bound the Government to accept the easement at the figure finally fixed, and made available funds constituting at least part payment. The statutory provision that the right to compensation shall vest at the time the declaration of taking is filed and title passes applies in situations where the right has not already vested; it does not require that a right which has previously vested must be disregarded.

III

Fairness to both the Government and the landowner requires a holding that the transfer of possession fixes

the date as of which payment should be made. Under the decision below the landowner would be deprived of his right to compensation for delay in payment. Moreover, to hold that the claim did not arise until later might also unfairly deprive owners of compensation as, for example, the holder of a fee subject to reverter, whenever use for the stated purpose should cease.

To allow trafficking in the claim against the United States by transfer of what is then only technical title since it has lost its prime effect of enabling the grantee to enter upon and use the land, would open the door for manipulations whereby the amount claimed might be artificially inflated without just cause.

ARGUMENT

I

THE CLAIM FOR COMPENSATION AROSE WHEN THE UNITED STATES PHYSICALLY TOOK POSSESSION AND BUILT THE PIPE LINE IN 1943

The Court of Appeals stated the issue of this case as being "whether the taking occurred and the claim arose when the United States went into possession" or when it subsequently made a deposit under the Declaration of Taking Act (R. 66). It agreed that, under the Assignment of Claims Act, a claim to compensation for the taking of property cannot be voluntarily transferred after it has arisen, citing *United States* v. *Shannon*, 342 U. S. 288; *23 Tracts of Land* v. *United States*, 177 F. 2d 967 (C. A. 6). In addition, it is a principle of eminent domain law that: "For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an

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earlier or later date, receives the payment." *Danforth* v. *United States*, 308 U. S. 271, 284; cf. *United States* v. *Dickinson*, 331 U. S. 745. This Court, in *Roberts* v. *Northern Pacific Railroad*, 158 U. S. 1, 10–11, regarded it as well settled that when a railroad company, having the power of eminent domain, entered into actual possession of land, the right to payment "belongs to the owner at the time the railroad company took possession" and is a personal claim which does not pass with a subsequent deed unless expressly conveyed. Any such express conveyance in this case would be a voluntary assignment of a claim against the United States rendered void by the Assignment of Claims Act.[8] The holding of the *Roberts* case that the claim arises upon the entry into possession is clearly correct and is a necessary result of fundamental principles with regard to the exercise of the federal power of eminent domain.

A. THE BASIC PRINCIPLES ARE THE SAME WHETHER THE FEDERAL RIGHT OF EMINENT DOMAIN IS EXERCISED THROUGH THE MEDIUM OF PHYSICAL SEIZURE, CONDEMNATION PROCEEDINGS, OR IN OTHER WAYS

The right of eminent domain does not rest upon express constitutional grant, but is implied from the necessity of acquiring the property essential to prosecution of the Government's appropriate functions without interference by owners unwilling to part with their property. *Kohl* v. *United States*, 91 U. S. 367, 371–372; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 527–530. The Fifth Amendment limits the exer-

[8] There is, thus, no basis for invocation here of the exception to that Act of assignments by operation of law.

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (R. 64–67) is reported at 238 F. 2d 898.

JURISDICTION

The judgment of the Court of Appeals was entered December 11, 1956 (R. 68). A timely petition for rehearing *en banc* was denied on January 3, 1957 (R. 68–74). By order of Mr. Justice Black, dated April 1, 1957, the time for filing a petition for certiorari was extended to April 19, 1957, the petition was filed on April 11, 1957, and was granted May 27, 1957 (R. 75). The jurisdiction of this Court is conferred by 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, in proceedings to condemn an easement, a claim to compensation vested in the landowner at the time of entry into possession by the United States pursuant to court order, or subsequently vested in a transferee at the time a declaration of taking was filed three years later.

STATUTES INVOLVED

Section 1 of the Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257, provides:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, provides:

> The Act of July 2, 1917 (40 Stat. 241), entitled "An Act to authorize condemnation proceedings of lands for military purposes," as amended, is hereby amended by adding at the end thereof the following section:
>
> "SEC. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board,

commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended."

The relevant portions of the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. 258 (a)–258 (e), are as follows:

SEC. 1. In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or

easement or right of way in laid for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the

rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

* * * * *

SEC. 4. The right to take possession and title in advance of final judgment in condemnation proceedings as provided by this Act shall be in addition to any right, power, or authority conferred by the laws of the United States or those of any State or Territory under which such proceedings may be conducted, and shall not be

construed as abrogating, limiting, or modifying any such right, power, or authority.

SEC. 5. In any case in which the United States has taken or may take possession of any real property during the course of condemnation proceedings and in advance of final judgment therein and the United States has become irrevocably committed to pay the amount ultimately to be awarded as compensation, it shall be lawful to expend moneys duly appropriated for that purpose in demolishing existing structures on said land and in erecting public buildings or public works thereon, nothwithstanding the provisions of Section 355 of the Revised Statutes of the United States: *Provided*, That in the opinion of the Attorney General, the title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein.

The pertinent provisions of the Assignment of Claims Act, 31 U. S. C. 203, are as follows:

> All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, [except as hereinafter provided], shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *

STATEMENT

This condemnation proceeding was commenced in March 1943, when the United States filed its petition to acquire a right-of-way for a pipe line for petroleum products or other materials over certain lands in Harris County, Texas (R. 3–17). Included therein was Parcel 1, the subject of the present case, representing a strip totaling some 2.7 acres out of a 617-acre tract (R. 5–6). The Government's petition relied upon various statutes including an 1888 Act and Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177 (R. 4). The court, *ex parte*, ordered the immediate delivery of possession as requested in the petition (R. 16, 28–30). Within the following 10 days, the United States and its contractor entered into actual physical possession and commenced laying the pipe line through this tract (R. 31, 49). The line was completed in 1943 and has been in continuous use since that time (R. 31, 49).

In November 1945, the 617-acre tract was sold to C. M. Dow (R. 32–36). The deed gave a metes and bounds description and included a general warranty except for an electric railway company right-of-way "and also except as to the right-of-way easements and condemnation proceedings hereinafter mentioned" (R. 35). Later, the deed states (R. 35) "It is expressly agreed that this deed is executed by Grantors and accepted by Grantee, as being subject to the existence of the following easements and proceedings: * * *." There follows a listing of (a) a pipe line right-of-way easement dated 1920, (b) an-

other pipe line right-of-way easement dated 1920, (c) an unrecorded power line easement and (R. 36):

> (d) Condemnation proceedings filed by the United States of America v. James Bute et al, Civil Action No. 955 in District Court of the United States, all as reflected in Lis Pendens Notice recorded in Vol. 7, page 218, Lis Pendens Records of Harris County, Texas. * * *

In May 1946, subsequent to Dow's acquisition of title, the Government filed a declaration of taking, covering this and several other parcels included in the right-of-way, under the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. 258(a)–258(e). Estimated compensation was deposited in court and judgment on the declaration of taking confirming these actions was entered (R. 17–22). A few months later, in October 1946, a second amendment to the petition was filed to name additional parties defendant including Dow (R. 22–23). The question of compensation was referred to commissioners under the Texas practice which at that time was applicable to federal condemnation proceedings.[1] Dow appeared at the commissioners' hearings in November 1948, pursuant to notice served upon him and presented evidence as to value (R. 40). His grantors were not served with notice of the hearing and no one else appeared at that time (R. 40).

Later in November 1948, the commissioners reported, awarding $4,450 as compensation for imposition of the easement over this tract (R. 43). The United States moved to set aside this award alleging

[1] Rule 71A, F. R. C. P., establishing federal condemnation procedure, became effective August 1, 1951.

that Dow had no interest in the land at the date it took possession of the right-of-way, and, therefore, was not entitled to receive compensation (R. 24–38). By agreement of the parties this motion was dropped from the court's calendar (R. 39) but subsequently the same relief was sought by a motion for summary judgment (R. 39–42). The court granted the motion in March, 1956. It found the facts as outlined above and, in addition, that the grantors intended to convey to Dow "all their right, title and interest in the said Parcel No. 1 or in the award to be made for the same" (R. 48–51). Its conclusions of law were that the deed is a prohibited assignment of a claim against the United States, is ineffective to convey to Dow the compensation due from the United States, and that Dow should be dismissed from the proceeding (R. 51–52). Judgment was entered accordingly, appropriate recitals being made under Rule 54 (b), F. R. C. P.[1] A few days later the court set aside the commissioners' award, permitted Dow's grantors to withdraw a disclaimer previously filed and to claim compensation for this parcel, and directed that further proceedings be had under Rule 71A, F. R. C. P. (R. 58–59).

The Court of Appeals for the Fifth Circuit reversed. It held that, despite the earlier physical appropriation by the United States in 1943, no claim to compensation "arose and vested" until the filing of a declaration of taking three years later in 1946,[2] and

[2] Judge Rives, the author of the opinion below, had expressed the same views earlier in his dissenting opinion in *Slattery Company, Inc.* v. *United States of America*, 231 F. 2d 37, 39.

cise of this power to the extent that it requires the payment of just compensation. However, it does not, as do the constitutions of many states (often referred to as "first pay" jurisdictions), require that compensation be paid in advance, or at the time, of appropriation of the property. *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U. S. 641; *Hurley* v. *Kincaid*, 285 U. S. 95. See also *Garrow* v. *United States*, 131 F. 2d 724 (C. A. 5), certiorari denied, 318 U. S. 765. In the "first pay" jurisdictions, a governmental body which seizes property prior to institution of some proceeding to determine compensation is a trespasser. But when a properly authorized officer of the Federal Government physically occupies property, it is not a tort or trespass, but constitutes a taking under the power of eminent domain. The owner is provided an adequate remedy to obtain compensation, in the District Court or Court of Claims, for such a taking by the Tucker Act (now 28 U. S. C. 1346 (a) (2) and 1491) and consequently cannot prevent the taking by injunction nor recover trespass damages against the government officers or agents. *Hurley* v. *Kincaid*, 285 U. S. 95, 104; *Yearsley* v. *Ross Constr. Co.*, 309 U. S. 18, 21-23.

The "first pay" constitutions in substance mean that the right of eminent domain can be exercised only through the medium of condemnation proceedings. There is no such limitation in exercise of the right by the United States through its agencies. The right of eminent domain has been exercised for more than 80 years by physical acts constituting a seizure of real

estate or the assertion of dominion over it. Thus *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 181, declared that "where real estate is actually invaded * * * so as to effectually destroy or impair its usefulness, it is a taking* * *." This procedure imposes upon the landowner the burden of instituting judicial proceedings to obtain just compensation. Federal statutes, especially during World War I, have established a similar process under which there is an administrative seizure accompanied by an offer of payment. If dissatisfied, the landowner is obliged to bring suit to recover compensation. See, *e. g.*, Section 10 of the Lever Act, 40 Stat. 276, 279; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 302.

Conversely, the United States initiates the court proceedings when the eminent domain right is exercised by means of condemnation proceedings. The first exercise of that power by proceedings brought by the United States in a federal court appears to be *Kohl* v. *United States*, 91 U. S. 367. In 1888 and 1890, two general statutes, which are still effective, were enacted, providing authority for the institution of condemnation proceedings whenever government officers are empowered to procure real estate for public uses. Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257; Act of August 18, 1890, 26 Stat. 316, 50 U. S. C. 171. At that time, the procedure in such cases conformed to local law, and this was not changed until Rule 71A, F. R. C. P., became effective in 1951, except for the ancillary procedure established by the Declaration of Taking Act of 1931, discussed later (*infra*, pp. 27–33).

The condemnation proceedings under the 1888 and 1890 Acts (which are now often denominated "ordinary" proceedings) constitute a process whereby the price of acquisition can be ascertained before any rights in the land are acquired by the Government. In such cases, the judgment represents, in effect, an offer to the condemnor which it is free to accept or reject. Upon acceptance by payment of the stated amount into court, title to and the right to possession of the interest condemned vest in the Government. See *Danforth* v. *United States*, 308 U. S. 271, 284–285. Such "ordinary" condemnation proceedings are still frequently employed when time is not pressing. However, at least by the time of World War I, the need for expedition resulted in the amendment of the 1890 Act so as to permit the taking of immediate possession of lands as to which proceedings to condemn for military purposes have been instituted. Act of July 2, 1917, 40 Stat. 241; 50 U. S. C. 171. A similar permanent authority for taking immediate possession of lands subject to condemnation is applicable to river and harbor improvements. Act of July 18, 1918, 40 Stat. 911, 33 U. S. C. 594. Various other statutes have authorized the courts to order the taking of immediate possession and such orders have been entered in the absence of statute. *Commercial Station Post Office* v. *United States*, 48 F. 2d 183 (C. A. 8). During World War II, the Second War Powers Act authorized the immediate taking of possession on court order, and this authority, under which possession was taken in the instant case, was widely used. Act of March 27, 1942, 56 Stat. 176 (*supra*, pp. 2–3). But the

power to take possession is not surrendered by th institution of condemnation proceedings; therefore even after a condemnation proceeding is instituted possession can still be taken under the general executive power without court order. *United States v Merchants Transfer & Storage Co.*, 144 F. 2d 32 (C. A. 9).

This examination of the two major procedures is no to be taken as indicating that those procedures are exclusive. Statutes have from time to time established procedures which have some of the features o both of these major categories. An early example i the Act of February 22, 1867, 14 Stat. 399, which is still law, 24 U. S. C. 271. Congress there provided for the establishment of national cemeteries and made it the duty of the Secretary of War to purchase real estate needed for that purpose and to obtain fee title. The Act then provides that, if he is unable to agree as to price with the owners or to obtain fee simple title from them, the Secretary "is hereby authorized to enter upon and appropriate any real estate" which is in his judgment suitable for the purposes of the Act (Section 4). Either the Secretary or the owner may apply for judicial appraisement in the court where the land is situated (Section 5). The Act concludes (Section 6) that fee simple title shall, upon payment of the appraisal value to the owners or deposit in court, be vested in the United States.

For present purposes the important point is that, whatever form the proceedings may take, two substantive rights exist. One is the governmental right

to seize and use property for any appropriate public purpose. The other is the landowner's constitutional right, guaranteed by the Fifth Amendment, to receive just compensation. And that compensation must be just both to the owner who is deprived of his property and to the public which is to pay for it. *Bauman* v. *Ross*, 167 U. S. 548, 574. The substantive rights are the same whether the Tucker Act procedure or condemnation proceedings are employed. See *e. g.*, *Hurley* v. *Kincaid*, 285 U. S. 95, 104, that "The compensation which he may obtain in such a proceeding [Tucker Act] will be the same as that which he might have been awarded had the defendants instituted condemnation proceedings which it is contended the statute requires." Cf. *United States* v. *Dickinson*, 331 U. S. 745; *United States* v. *Cress*, 243 U. S. 316; *United States* v. *2,648.31 Acres of Land*, 218 F. 2d 518 (C. A. 4). In *Jacobs* v. *United States*, 290 U. S. 13, this Court declared (p. 16): "The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim." A Court of Appeals recently stated, "Under the decisions it is of no moment whether the taking is by physical action of the Government, or by means of condemnation proceedings. The measure of compensation is the same; only the procedure differs." *Intertype Corporation* v. *Clark-Congress Corporation*, 240 F. 2d 375, 379 (C. A. 7).

B. PHYSICAL SEIZURE OF PROPERTY GIVES RISE TO THE CLAIM FOR COMPENSATION, WHETHER THE AMOUNT IS DETERMINED UNDER THE TUCKER ACT OR IN CONDEMNATION PROCEEDINGS

Basic to the Tucker Act decisions is the fact that the taking which creates the right to compensation is

the physical seizure of the property. In one of the earliest and leading cases, *United States* v. *Lynah*, 188 U. S. 445, 470–471, the distinction between the taking and the transfer of title was spelled out as follows:

> It is clear from these authorities that *where the government* by the construction of a dam or other public works *so floods lands belonging to an individual as to substantially destroy their value there is a taking* within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from his that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee; and *when the amount awarded as compensation is paid the title, the fee,* with whatever rights may attach thereto—in this case those at least which belong to a riparian proprietor—*pass to the government and it becomes henceforth the full owner.* [Emphasis added.]

The principle is reiterated in brief form in later decisions that "The owner is protected by the rule that title does not pass until compensation has been ascertained and paid * * *." *Hanson Lumber Co.* v. *United States,* 261 U. S. 581, 587; *Danforth* v. *United States,* 308 U. S. 271, 284–285; *Cherokee Nation* v. *Southern Kansas Railway Co.,* 135 U. S. 641, 659.[4] The

[4] The general rule is subject to qualifications which have no bearing on the instant case, such as that if the United States has paid the value of property into court in proper proceedings it is not responsible for mistakes that may be made in distribution of the funds resulting in the true owner not receiving

many aspects in which the date of taking—meaning the date of taking possession—is significant will be mentioned later (*infra*, pp. 34–39). One of the most important is that the obligation to pay arises as of the time of taking and the Constitution requires that compensation, usually in the form of interest, be made for any delay in payment. The basis for this requirement was expressed in *Old Dominion Co.* v. *United States*, 269 U. S. 55, 65:

> In the often quoted language of Chief Justice Shaw: "If a pie-powder court could be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, while they apply the axe with the other." *Parks* v. *Boston*, 15 Pick. 198, 208.

The leading case on this subject, *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, is express that taking means taking possession, when it says (p. 306): "Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking."[5] See also *Liggett & Myers* v. *United States*, 274 U. S.

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payment; nor does this rule prevent the passage of title in those cases where the owner fails to take advantage of his opportunity to recover compensation within the six-year limit of the Tucker Act or other applicable time limit.

[5] This opinion is also significant in that it characterizes as "condemnation" proceedings under the Lever Act which procedurally is very similar to the Tucker Act (see *supra*, p. 15).

215; *Phelps* v. *United States*, 274 U. S. 341; *Jacobs* v. *United States*, 290 U. S. 13. The logic of the holding that the passage of title, not the taking of possession, constitutes the taking would make recovery under the Tucker Act impossible, since in that procedure there is no passage of title until the payment of compensation is made after the court's judgment.

It is thus clear that a seizure of possession constitutes a taking giving rise to a claim for compensation which may be enforced in Tucker Act proceedings if the Government does not provide a remedy by instituting condemnation proceedings. And when condemnation proceedings are so instituted, the earlier taking of possession constitutes the date of taking. For example, in *United States* v. *Rogers*, 255 U. S. 163, interest was awarded from the time of flooding in 1912 although the proceedings were not instituted until 1915.[6] This Court referred to the 1912 flooding as the time at which the Government "had actually taken them [the lands], and had deprived the owners of all beneficial use thereof * * *" (p. 169). See also *Forbes* v. *United States*, 268 Fed. 273, 278 (C. A. 5); *Barnes* v. *United States*, 241 F. 2d 252 (C. A. 9); *Intertype Corporation* v. *Clark-Congress Corporation*, 240 F. 2d 375 (C. A. 7); *Bank of Edenton* v. *United States*, 152 F. 2d 251, 254 (C. A. 4).

The same principles have led the courts of appeals to hold that "it is well settled that, either where no declaration of taking is filed or where, as here, the

[6] 1912 was also used as the date of valuation. *United States* v. *Rogers*, 257 Fed. 397 (C. A. 8).

declaration of taking is filed on a date subsequent to the actual passing of possession, the market value of the property taken should be determined as of the date possession was acquired." *11,000 Acres of Land, etc.* v. *United States*, 152 F. 2d 566, 568 (C. A. 5), certiorari denied, 328 U. S. 835; *United States* v. *Vilbig*, 208 F. 2d 663 (C. A. 5); *Anderson* v. *United States*, 179 F. 2d 281 (C. A. 5), certiorari denied, 339 U. S. 965; *Comparet* v. *United States*, 164 F. 2d 452 (C. A. 10); *United States* v. *6.87 Acres of Land, etc.*, 147 F. 2d 351 (C. A. 2). See also *United States* v. *Mahowald*, 209 F. 2d 751 (C. A. 8). These decisions are all founded on the proposition that market value is to be determined at the date of taking. Thus, *Vilbig* holds that "generally speaking the date property is taken is the correct valuation date" (208 F. 2d at p. 664) and the *Anderson* opinion states the question before it to be "which date was the time of taking" (179 F. 2d at p. 282). So also in *Comparet* the court ruled (164 F. 2d at p. 453). "When the Government acquired possession in 1942 there was a 'taking' of appellant's property for public use; compensation therefor was then due and payable, and under the Federal rule of decisions its fair market value should be determined as of that date."

Addressing itself specifically to the question as to when a claim arises, the court in *23 Tracts of Land* v. *United States*, 177 F. 2d 967 (C. A. 6), declared (p. 970) that "it would seem clear that the taking of physical possession of the property by the Government and the appropriation of it to its own purposes is a taking for which the then owner is entitled to

compensation under the constitution. The owner at that time, rather than the owner at an earlier or later date, is the one who has the claim and is to receive the payment. This would seem to be equally true whether the taking is without authority of a court order or in compliance with a court order requested by the condemnor [citations]". The 1867 statute (*supra*, p. 17), distinguishing between physical appropriation and vesting of title, shows the congressional understanding, since early days, in accord with this long-established line of decisions.

The present opinion stands alone, we believe, among all the federal appellate decisions in holding that taking means taking of title so that no claim arises until then. Its mistake apparently stems from a misunderstanding of two decisions of this Court, *Danforth* v. *United States*, 308 U. S. 271, and *United States* v. *Dickinson*, 331 U. S. 745. *Danforth* rejected the landowner's claim for interest upon the ground that there had been in that case no taking. There was neither physical seizure (or in the language of the opinion (p. 286) "direct appropriation"), nor had a substantial burden of caring for greater floods, in the nature of an easement to flood, been imposed upon the land. Upon this basis, the opinion restated the principles summarized above (p. 16) applicable to ordinary condemnation proceedings where neither possession nor title is taken during the course of the proceedings. Thus the Court held (p. 284) that: "Unless a taking has occurred previously in actuality or by a statutory provision * * *" the payment of

the award is the taking. By "actuality" the Court obviously meant physical taking of possession.

United States v. *Dickinson*, 331 U. S. 745, likewise lends no support to the lower court's theory that the taking is not complete until title passes. The problem in that case was at what point in the course of a continuous flooding process the taking of any easement might be considered to be complete so that the time limitation of the Tucker Act commenced to run. There was no suggestion that no taking occurred even after the flooding was complete until such time as title might vest. On the contrary, in holding that Dickinson's reclamation was no defense, the Court said (p. 751): "When the property was flooded the United States acquired the land and it became part of the river". We do not know of any case where the United States physically occupied property, under a grant of authority, but the owner was denied compensation therefor on the ground that there had been as yet no taking.[7]

[7] In his Brief in Opposition (p. 5), the respondent cites the following language from *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U. S. 641, 659, as holding that taking occurs when title passes: "Within the meaning of the Constitution, the property, although entered upon, pending the appeal, is not taken until the compensation is ascertained in some legal mode, and, being paid, the title passes from the owner." However, when this sentence is read in context, it is apparent that the Court was in fact talking not about the date as of which an owner was required to surrender his property, but rather about what legal rights he retained in order to assure himself of payment from a railroad which had previously occupied his property.

C. THE ABILITY OF THE UNITED STATES TO ABANDON ITS PROJECT UP TO THE TIME TITLE PASSES AND DISCONTINUE PROCEEDINGS TO CONDEMN FEE TITLE DOES NOT PREVENT PHYSICAL POSSESSION FROM BEING A TAKING

It was the power to abandon the proceedings which also seems to have greatly influenced the court below. (See R. 67). But the existence of that power does not change the fact that physical seizure is a taking. It merely means that the duration of the property interest taken may be ambiguous. An abandonment of the project after physical seizure and discontinuance of proceedings to condemn fee title or other interest results in reducing the interest taken to a temporary interest for the period of possession. *Moody* v. *Wickard*, 136 F. 2d 801 (C. A. D. C.), certiorari denied, 320 U. S. 775; *O'Conner* v. *United States*, 155 F. 2d 425 (C. A. 9). In that event, compensation is measured by the principles governing the taking of a right to use property temporarily. Cf. *Kimball Laundry Co.* v. *United States*, 338 U. S. 1. Indeed, every temporary taking—for example, those many cases during World War II when use only for the duration of the emergency was needed—is, in effect, a taking in which affirmative notice is given from the beginning that there will be abandonment when the need ceases.

This indefiniteness is not greatly different from the ambiguity which exists in every taking where compensation is left to a Tucker Act proceeding. That title which is necessary for operation of the Government's project is ultimately transferred. *United States* v. *Cress*, 243 U. S. 316. Since there is no pleading de-

fining the nature of the property interest sought by the Government, reliance must be placed on other criteria. In most cases the nature of the project will indicate the extent of its permanency, as in the case of dams and other river improvements. On the other hand, use of the property taken as part of a project of limited duration may indicate that only a temporary interest has been taken. Cf. *United States* v. *Causby*, 328 U. S. 256. And every Tucker Act taking, just as much as takings in the course of condemnation proceedings, is subject to the possibility that the Government will abandon its project. However, in the great mass of cases, whether they take the form of condemnation proceedings or Tucker Act cases, the judgment is in fact paid rather than the property being surrendered. At that time title to the interest originally taken passes to the Government. The possibility that a particular case may develop into one of those scattered instances where the project is abandoned does not alter the fact that seizure of possession is a taking.

The physical acts, here, of entering into physical possession within 10 days after the order of possession, the laying of a pipe line through the land, and the subsequent operation of the pipe line, clearly constituted a taking of an easement. There was no real question as to the duration of the easement. When the declaration of taking was filed, it did not change the nature of the taking; it merely provided a basis for making a payment which would limit liability for interest and provide the owner with immediate payment, events which otherwise would occur only when the final judgment should be paid. As an incident

of these steps, title passed to the Government and its right to abandon the taking, and thus change the duration of the interest taken, ended.

We submit that the taking occurred when possession was seized and that the claim for compensation then arose. No one would doubt that this would be the case if the condemnation proceeding had not been brought. The fact that the Government proceeded by means of condemnation and a court order for possession should not change the substantial result of the taking of possession.

II

THE FILING OF A DECLARATION OF TAKING THREE YEARS AFTER POSSESSION WAS TAKEN DID NOT DESTROY THE EXISTING CLAIM OR CHANGE ITS NATURE

The Court of Appeals gave controlling effect to the passage of title upon the filing of the declaration of taking and the deposit of funds in court. In cases where there had been no taking previously, such actions would constitute the date of taking and, hence, the date upon which the claim for compensation accrues. However, an earlier taking of possession establishes the date of taking and the date the claim accrues, as the courts held in *11,000 Acres of Land, Etc.* v. *United States*, 152 F. 2d 566 (C. A. 5), certiorari denied, 328 U. S. 835; *23 Tracts of Land* v. *United States*, 177 F. 2d 967 (C. A. 6), and the other case cited *supra*, p. 22.

The Court of Appeals below thought (see R. 67) that the Declaration of Taking Act removed uncertainty theretofore existing as to what was the date of taking. But, as the cases just cited show, there had

never been the slightest doubt that a seizure of possession was a taking. In this respect there was no uncertainty for the Declaration of Taking Act to remove and it was enacted for entirely different purposes. Apparently the Court of Appeals shared the error of the court in *United States* v. *40,379 Square Feet of Land, etc.*, 58 F. Supp. 246 (D. Mass.) as to the purpose, meaning, and effect of federal condemnation statutes. That District Court thought that the Declaration of Taking Act was an independent condemnation statute, alternative to the Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257. It spoke of takings "under the 1888 Act" or the Declaration of Taking Act as if they are mutually exclusive and said (58 F. Supp., p. 250) that it "was perhaps due to accident or confusion that this proceeding began under the 1888 Act * * *." The following analysis makes clear that the court misunderstood the function of the 1931 Declaration of Taking Act.[8]

A condemnation proceeding cannot be commenced under the Declaration of Taking Act. By its terms, it is an *ancillary* remedy which may be invoked at any time in "any proceeding * * * which has been or may be instituted * * *," *supra*, p. 3. It is the 1888 Act which authorizes the Attorney General to institute the proceedings and which confers jurisdiction upon the

[8] The court's misunderstanding is further illustrated by its assertion that state law determines the date as of which title is acquired and property is valued (58 F. Supp. at p. 249). These are matters of substantive law rather than procedure. Hence even before 1951, at a time when conformity to local procedure was required, federal law controlled those questions. *United States* v. *Miller*, 317 U. S. 369, 380; *Comparet* v. *United States*, 164 F. 2d 452 (C. A. 10); *United States* v. *Mahowald*, 209 F. 2d 751 (C. A. 8).

courts.[9] The Second War Powers Act supplemented this 1888 Act in authorizing condemnation for war purposes and in providing for immediate delivery of possession. Similarly, the Declaration of Taking Act supplemented the 1888 Act by providing for the filing of a declaration of taking in the pending proceeding. When the declaration is filed and deposit made, the Declaration of Taking Act provides that title vests in the United States and the right to compensation vests in the persons entitled thereto. The United States is then irrevocably committed to taking the land and the court is empowered to make appropriate orders as to possession and other matters. The Act provides for a judgment awarding compensation, including interest, on whatever amount the ultimate award may exceed the amount of the deposit.

As its title states (46 Stat. 1421), the objective of the statute was "to expedite the construction of public buildings and works", by permitting demolition of existing structures and construction of public structures without awaiting conclusion of the case (Section 5, 40 U. S. C. 258a (e)). In *United States* v. *Miller*, 317 U. S. 369, 381 said:

> The purpose of the statute is two-fold. First, to give the Government immediate possession of the property and to relieve it of the burden of interest accruing on the sum deposited from the date of taking to the date of judgment in the eminent domain proceeding. Secondly, to give the former owner, if his title is clear, immediate cash compensation to the extent of the

[9] The jurisdictional and venue provisions of the Act are now codified in 28 U. S. C. 1358 and 1403.

> Government's estimate of the value of the property. * * *

The latter element is particularly important since few of the other statutory authorities for taking possession (*supra*, pp. 15–17) provide for or require the making of a deposit.

In *Catlin* v. *United States*, 324 U. S. 229, this Court pointed out that the Act is not an independent one providing for a new condemnation but "merely affords steps ancillary or incidental to suits brought under other statutes * * *." Further, the opinion stated (p. 240):

> The procedure clearly is ancillary to the main condemnation proceeding, cf. *United States* v. *17,280 Acres of Land*, 47 F. Supp. 267, 269, is intended to dovetail with it and by § 4 is declared expressly to provide rights which are to be "in addition to" preexisting rights and are not to "be construed as abrogating, limiting, or modifying" them. This provision, inserted primarily to safeguard the Government's interest, is not expressly so limited; and we think it may be applied also to safeguard the owner's preexisting rights where doing this will not be in essential conflict with the additional rights validly conferred on the Government. This would be done by preserving his preexisting right of appeal.

Accordingly, the decision was that the owner's preexisting right to challenge the taking upon appeal from the final judgment was preserved by construing the title vested under the statute to be a defeasible one.

Exactly the same reasoning applies to the present case so that the owner's preexisting right, arising at the date possession was taken, to recover compensation including an amount because of delay in payment from date of possession, was not abrogated by the filing of the declaration of taking in 1946. The provision of that Act that upon filing of the declaration and the making of the deposit the right to just compensation shall vest in the persons entitled thereto (*supra*, p. 4) obviously contemplated a case in which that right had not previously vested in the owners. Only by so construing the Act can the various statutes be dovetailed as was intended. Similarly, in order to give a reasonable application of the statute, this Court has held, although the Act does not in terms so provide, that the United States can secure the return of any overpayment it should deposit. *United States* v. *Miller*, 317 U. S. 369. Also, the interest provisions of the Act are simply declaratory of the constitutional requirement for compensation for delay in payment and, although the Act does not so provide, do not apply when compensation is determined by contract rather than by litigation. *Albrecht* v. *United States*, 329 U. S. 599.

The present case and the *Catlin* case are merely two examples of the way in which the various statutory procedures should be combined to obtain a sensible conclusion. The authority to take possession in both instances was used first to satisfy the emergency needs of the United States. In these instances the authority of the Declaration of Taking Act to obtain possession

was not required nor used. However, for many reasons, delay in entry of final judgment was inevitable. Hence, when appraisals and title data were obtained, the declaration of taking procedure was invoked for the purposes of reducing the Government's interest liability and of furnishing the owners with partial payment. The passage of title was solely incidental and not necessary to the Government's purposes. We submit that employment of the declaration of taking procedure for the purposes for which it was used was plainly appropriate and proper.

Other instances of employment of condemnation procedures to seek a reasonable result in the particular circumstances may be cited. In a case where the United States claimed to possess the right, without compensation, to use certain property for war purposes, but desired to condemn if it had no such right, the entire matter was settled in a condemnation proceeding wherein a declaration of taking was filed. Under the literal wording of the statute the right to compensation then vested in the owner but the Court of Appeals reasonably held that, since the United States did have the right of free use, no compensation was payable, saying that there was much good sense in combining alternative theories in a simple proceeding. *United States* v. *San Geronimo Development Co.*, 154 F. 2d 78 (C. A. 1). Condemnation proceedings are frequently employed in the nature of a quiet title action to acquire the land at a price which has been fixed by contract and the price is deposited in court with a declaration of taking. In such a case

it is not constitutional "just compensation" under literal application of the statute which is awarded, but rather the contract price determines the amount of the judgment. *Albrecht* v. *United States*, 329 U. S. 599; *Mahowald* v. *United States*, 176 F. 2d 509 (C. A. 8). So here, we submit, the literal language of the Act does not apply because the right to compensation had already vested in the landowner. The filing of the declaration of taking simply made the deposit available to the owner, reduced the Government's liability for interest, and gave assurance that the taking would not be abandoned. It had no other purpose and no other effect.

In his brief in opposition, the respondent argued (pp. 2–3) that the Government was trying to read out of the statute the provision that, upon the filing of a declaration of taking and the payment of the deposit, "the right to just compensation for the same shall vest in the persons entitled thereto; * * *" (*supra*, p. 4). This provision is of prime importance where there has been no previous taking at all, since in that circumstance it does fix the time when the right to compensation vests, regardless of when physical possession later passes. But this cannot mean that a right which has already become vested must be disregarded and a new right created under the statute. The Declaration of Taking Act means only that, if the right to just compensation has not already vested in the persons entitled thereto, the filing of the declaration shall vest the right; and in any case the Government shall no longer have the right to abandon the property.

III

THE RULE HERE ADVOCATED IS THE ONLY FAIR RESULT BOTH FROM THE POINT OF VIEW OF THE UNITED STATES AND OF THE LANDOWNER

The precise issue in the present case—whether it is the owner at the date of taking possession or the owner at the subsequent date when a declaration of taking is filed—financially affects the United States in only a minor degree so far as this case is concerned. There is nothing to indicate that the amount of compensation will be affected except that three years' interest will be disallowed, to the advantage of the United States. The court here found that the vendors intended to transfer to Dow all interest in the property or in the award (Fdg. 7, R. 51). However, normally speaking, real estate is sold "as is", that is, in its condition at the date of transfer, the vendor retaining existing causes of action for damages to the property (see *supra*, p. 13). Vendees are not generally anxious to buy a lawsuit. When, as in this case, the United States takes possession and constructs its project, subsequent purchasers are naturally going to value the property in that condition, not as it existed before the Government entry. Thus, the result we advocate would, we submit, be more consistent with normal real estate practice than that of the court below.

Beyond this particular case, many other important consequences result from the determination of the date of taking. The most significant of these are that it determines (1) the date from which interest repre-

senting compensation for delay in payment commences to run, (2) the date of valuation, and (3) the date as of which the condition of the property, both physically and title-wise, is fixed for valuation purposes.

Obviously, interest for delay in payment cannot be due until payment is due. Hence, under the decision below no interest is due until the declaration of taking is filed and deposit made. The decision below seems to say that the United States had no interest liability between 1943 and 1946. It said that liability for use and occupancy with restoration damage "did not actually accrue" since the United States did not abandon the proceeding.[10] It is unfair to the owner, and violates his constitutional rights, to deprive him of any compensation for that period. Moreover, the rule of the Court of Appeals would wipe out the compensation-for-delay-in-payment principle in all

[10] The court in *United States* v. *20,379 Square Feet of Land, etc.*, 58 F. Supp. 246 (D. Mass.), *supra*, met this problem by awarding the owner a sum for use and occupancy, greater in amount than interest would have provided, for the period from the time possession was taken until title passed. If the Government accomplished a complete and permanent taking at the time it took possession (as in the present case), the owner had no constitutional or statutory right to more than interest on the fair value of his property as of the time of taking, and running until payment. To transform the Government's possession into some sort of constructive lease for part, but not all, of the period prior to payment, is an awkward and unnecessary complication grafted upon the rights which this Court has many times held vest in the owner at the time of the initial taking. And this becomes additionally complicated when the Government's taking is of a temporary interest, for example for one year renewable for a stated period, as were many of the wartime takings.

cases when no declaration of taking is filed since otherwise title does not pass until the award is paid.

The second important consequence of the date of taking is that it establishes the date of valuation. The decisions so holding (*supra*, p. 22) do not, as the court below suggests, represent an equitable rule that property should be valued at a time prior to a taking. Rather, they are holding that the date of valuation, in all logic and reason, must coincide with the date of taking. It is eminently reasonable to determine the amount of a claim with regard to the facts existing at the date the claim accrues. The property owner's rights should be measured by reference to the time when he is deprived of use of his property.

The third important general aspect of the date of taking, and a correlative of the date of valuation, is the fixing of the condition with regard to which the valuation is made. Physical changes naturally follow the taking of possession by the Government. But a holding that the taking does not occur until later would render dubious the owner's right to recover for improvements destroyed or depreciation caused to the property by the Government's occupation. Cf. *United States* v. *Bobinski*, 244 F. 2d 299 (C. A. 2). So also the owner's compensation might well be reduced because of reclamation activities he conducted after the Government started to flood his land but before a declaration of taking was filed. Cf. *United States* v. *Dickinson*, 331 U. S. 745.

Postponement of the date of taking, and hence the date as of which the state of the title is determined, might likewise have the effect of depriving a particu-

lar party of the compensation to which it is justly entitled. Many properties, such as railroad rights-of-way, churches, public parks, etc., are held subject to reverter if use for the designated purpose ceases. Heretofore, the federal courts have uniformly rejected the claim of the reversioner to any substantial compensation for the reason, *inter alia*, that there was no gap between cessation of use and taking. *Terminal Coal Company* v. *United States*, 172 F. 2d 113, 116 (C. A. 3).[11] The court there stated "The contention of appellant could have validity only if some interval of time elapsed between the surrender of the interest of the railroad and that of appellant." But under the decision below an interval of years might intervene between cessation of use and accrual of the claim to compensation. With such a foundation it would be logically difficult to deny the claim of the reversioner to all of the compensation.

A different aspect of the same fundamental problem is shown by *People* v. *Peninsula Title Guaranty Company*, 301 P. 2d 1 (Cal.), holding that the taking of possession under court order is a taking, with the result that the land was not subject to a special assessment lien for drainage purposes attempted to be subsequently recorded. *Intertype Corporation* v. *Clark-Congress Corporation*, 240 F. 2d 375 (C. A. 7), suggests a situation where, to protect himself against claims of his tenant, a lessor might be forced to

[11] *People of Puerto Rico* v. *United States*, 132 F. 2d 220, 221–222 (C. A. 1), certiorari denied, 319 U. S. 752; *Woodville* v. *United States*, 152 F. 2d 735, 737–738 (C. A. 10), certiorari denied, 328 U. S. 842; *State of Texas* v. *Harris County Houston Ship C. N. Dist.*, 158 F. 2d 861, 864 (C. A. 5).

oppose a taking of possession rather than settle the matter amicably with the United States. If a taking of possession is not a taking, the tenant might well claim eviction and breach of the covenant of quiet enjoyment.

Each of these illustrations emphasizes the great difficulty, if not impossibility, of valuing property as of one date, but according to its physical condition and the state of its title at a considerably later date.

The separation of possession and taking would likewise open the door to manipulations which would unduly increase the Government's liability. After the United States takes possession, the landowner has, in practical effect, only a right to recover compensation. A single parcel, because of plottage or other reasons, may be valued at more than the sum of its four component tracts. Cf. *United States* v. *Runner*, 174 F. 2d 651 (C. A. 10). The ruling below permits the owners after the date of valuation to combine their interests by transfers, solely for the purpose of obtaining an increased award. Similarly, after physical use has ceased, a purchase might be made by an adjoining landowner in order to create a claim, not otherwise existing, for so-called severance damages. See *United States* v. *Miller*, 317 U. S. 369.

Boston Chamber of Commerce v. *Boston*, 217 U. S. 189, further demonstrates the possibility of manipulation. There, land subject to an easement of way, light, and air was condemned. The fee owner and the beneficiary of the easement claimed that the property

should be valued as an unencumbered fee and the resulting award divided between those interested. On values agreed to by the parties, the acceptance of this contention would have increased the compensation awarded more than tenfold from $5,000 to $60,000. This Court rejected the claim holding that "the Constitution does not require a disregard of the mode of ownership—of the state of the title." Similar cases in federal condemnation arose in *Southern California Fisherman's Association* v. *United States*, 174 F. 2d 739 (C. A. 9), and *Messer* v. *United States*, 157 F. 2d 793 (C. A. 5). Landowners could, under the decision below, seek to avoid this rule by simply merging their interests after the Government has taken possession but before title has passed.

Also, federal officers could reduce the compensation payable to owners in some of the above instances by simply withholding filing of the declaration of taking until the situation most favorable to the Government exists. Cf. *United States* v. *Miller*, 317 U. S. 369. This is so since the invocation of the declaration of taking procedure rests solely in the discretion of the administrative officer.

On all these grounds, we submit that the decision below gives to the declaration and deposit an effect never intended, resulting in confusion, rather than the certainty the court below was searching for, and, in particular cases, producing an unfair award to property owners or to the United States.

CONCLUSION.

For the foregoing reasons it is submitted the judgment below should be reversed and that of the trial court affirmed.

Respectfully.

J. LEE RANKIN,
Solicitor General.

PERRY W. MORTON,
Assistant Attorney General.

ROGER P. MARQUIS,
Attorney.

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